FEDERAL ELECTION COMMISSION
Washington, DC 20463

DISSENTING OPINION

OF

COMMISSIONER HANS A. von SPAKOVSKY

IN ADVISORY OPINION 2006-24
(ELECTION RECOUNTS)

On October 5, the Federal Election Commission ("the Commission") issued an Advisory Opinion on a vote of 4 to 2 to the National Republican Senatorial Committee, the Democratic Senatorial Campaign Committee, and the Republican State Committee of Pennsylvania ("the Requestors") over the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the establishment and administration of accounts by Federal candidates' principal campaign committees and a state party to pay recount and election contest expenses resulting from the upcoming federal election on November 7, 2006.

I dissented from the Advisory Opinion because the majority opinion misinterprets and misapplies the law, and also effectively rewrites and repeals two regulations that have existed for nearly 30 years a mere month before a national election.[1] The statute that the Commission is tasked with enforcing specifically states that regulations may not be amended or repealed by advisory opinion. The Advisory Opinion issued by the Commission in this instance is an *ultra vires* act that exceeds the Commission's authority.

Recounts are not "elections" under the plain and clear definition contained in the Act, *see* 2 U.S.C. § 431(1), so funds solicited, received and spent in connection with a recount are not funds solicited, received or spent in connection with an *election*, and therefore are not subject to 2 U.S.C. § 441i(e)(1). There is no evidence that Congress intended through the Bipartisan Campaign Reform Act of 2002 ("BCRA") to implicitly (it certainly did not do so explicitly) overturn either the Commission's 30 year-old regulations or previous Advisory Opinions on the treatment of recount funds. In fact, there is substantial evidence of legislative acquiescence to the Commission's longstanding treatment of recount funds. BCRA's restrictions at 2 U.S.C. § 441i(e)(1) on Federal candidates soliciting, receiving, directing, transferring, or spending funds in connection with either Federal or non-Federal *elections* do not alter the Commission's prior treatment of funds raised and spent by Federal candidates for recounts and recount funds.

[1] Chairman Michael E. Toner also voted against adoption of the Advisory Opinion.

I. WHETHER RECOUNT ACTIVITIES ARE AN "ELECTION" FOR FEDERAL OFFICE

The central question asked by the Requestors was whether activities conducted by a Federal candidate's recount fund are in connection with an election for Federal office so that the limitations of 2 U.S.C. § 441i(e)(1)(A) apply. The obvious answer is "no," since a recount is not an "election" under the Act. Therefore, the restrictions of 2 U.S.C. 441i(e)(1)(A) do not apply to the activities of a recount fund. However, Commission regulations still prohibit donations to a Federal candidate's recount fund from national banks, corporations, labor organizations, and foreign nationals. 11 CFR 100.91 and 100.151. An examination of the history of these regulations confirms that Congress never objected to the Commission's understanding of what constitutes an "election" – despite nearly 30 years of opportunity to do so – and that there is no basis to now suddenly disregard those regulations and abruptly change the Commission's longstanding treatment of recount activities. In fact, public policy concerns argue against such action.

A. History of the Commission's Recount Regulations

The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift, loan, or payment of money or anything of value made by any person for the purpose of influencing a Federal election. 2 U.S.C. § 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.52(a) and 100.111(a). Commission regulations promulgated in 1977 before the enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), make exceptions from these definitions for "a gift, subscription, loan, advances, or deposits of money or anything of value made with respect to a *recount* of the results of a Federal election." 11 CFR 100.91 and 100.151 (*emphasis added*).[2]

The recount regulations (11 CFR 100.91 and 100.151) are premised on the Commission's interpretation of the statutory term "election" to exclude recounts. *See* 2 U.S.C. § 431(1); *see also* 11 CFR 100.2. The Act defines elections to include primary, general, special and runoff elections, but it does not include recounts. *See* 2 U.S.C. § 431(1); 11 CFR 100.2. The Commission explained this exclusion when it first enacted the recount regulations in 1977. "Also excluded from the definition of contribution is a donation to cover the costs of recounts . . . , since, though they are related to elections, [they] are not Federal elections as defined by the Act." *Federal Election Regulations, Explanation and Justification of the Disclosure Regulations*, H.R. Doc. No. 95-44, at 40 (1977). The recount regulations expressly bar the donation, acceptance, or use of funds prohibited by 11 CFR 110.20 (foreign nationals) and Part 114 (corporations, labor organizations, and national banks). 11 CFR 100.91 and 100.151.

[2] After BCRA was passed, these regulations were reenacted and recodified without substantive change, effective November 6, 2002. *See* 67 Fed. Reg. 50582 (Aug. 5, 2002). From 1980 to 2002, they appeared at 11 CFR 100.7(b)(20) and 100.8(b)(20). Prior to 1980, similar provisions appeared at 11 CFR 100.4(b)(15) and 100.7(b)(17). *See* 45 Fed. Reg. 15080 (Mar. 7, 1980).

In two prior advisory opinions, the Commission addressed the application of pre-BCRA law to election recounts. First, in Advisory Opinion 1978-92 (Miller), the Commission concluded that any funds received by a separate organizational entity established by the candidate's authorized committee solely for the purposes of funding an election recount effort would not be subject to the contribution limitations of 2 U.S.C. § 441a, and would not trigger political committee status or reporting obligations for the separate election recount entity. The Commission also concluded that the separate recount entity could not accept funds from corporations, labor organizations, and national banks, which were included in 11 CFR 100.4(b)(15).[3] The Commission noted that involvement of current officers and staff of the authorized committee as organizers and principals in a separate election recount entity would not change these conclusions.

In Advisory Opinion 1998-26 (Landrieu), the Commission considered a candidate's principal campaign committee that established, as a wholly separate entity, a contested election trust fund. The Commission concluded that the trust fund was not subject to reporting requirements and could accept amounts in excess of the contribution limitations in 2 U.S.C. § 441a, but could not accept funds from prohibited sources, as specified in the predecessors to the recount regulations, 11 CFR 100.7(b)(20) and 100.8(b)(20).

BCRA took effect after these advisory opinions were issued. Under BCRA, candidates and Federal officeholders may not solicit, receive, direct, transfer, or spend funds "in connection with an *election* for Federal office" unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act (*i.e.*, are "Federal funds"). 2 U.S.C. § 441i(e)(1)(A) (*emphasis added*); *see also* 11 CFR 300.2(g). BCRA also imposes limitations on the funds Federal candidates may solicit, receive, direct, transfer, or spend "in connection with any *election* other than an election for Federal office." 2 U.S.C. § 441i(e)(1)(B) (*emphasis added*).

The Commission's treatment of recount funds over the past 30 years, based on the rationale that recounts are not "elections," was well known by Congress. That treatment was first expressed in the 1977 regulations, applied in Advisory Opinion 1978-92, recodified in 1980, and applied again in Advisory Opinion 1998-26. At no point in this period did Congress act to alter the Commission's approach, although it amended the Act several times. In 2002, only two years after what is arguably the most controversial and important presidential recount in American history, Congress enacted BCRA with no amendment to the definition of "election" to include recounts. The legislative history offers no indication that Section 441i(e)(1) was intended to apply to recounts. When Congress is aware of an agency's interpretation of a statute and does not amend that statute, Congress is presumed to accept that interpretation as correct. *See*, *e.g.*, *Lorillard v. Pons*, 434 U.S. 575 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

[3] Advisory Opinion 1978-92 (Miller) cited the then-current recount regulations found at 100.4(b)(15) and 100.7(b)(17). In the 1980 recodification of 11 CFR 100.4(b)(15) and 100.7(b)(17) as 11 CFR 100.7(b)(20) and 100.8(b)(20), respectively, the prohibition on funds from foreign nationals was added to the regulation. *See* 45 Fed. Reg. 15080, 15102 (Mar. 7, 1980).

Following the enactment of BCRA, the Commission recodified its recount regulations, and specifically **reaffirmed that recounts are not "elections."** When the Commission reorganized its regulations regarding "contributions" and "expenditures" during the BCRA rulemakings, one commenter "advocated the complete, or at least partial, elimination of the exception to the definitions of 'contribution' and 'expenditure' for recounts and election contests, on the basis that recounts and election contests, which are not Federal elections as defined by the Act, *see generally Federal Election Regulations*, H.R. Doc. No. 44, 95th Cong., 1st Sess. at 40 (1977) . . . 'serve as an avenue for the use of soft money to influence federal elections,' as evidenced by unregulated contributions used to pay for the 2000 Florida recount." *Final Rules on Reorganization of Regulations on "Contribution" and "Expenditure,"* 67 Fed. Reg. 50,582, 50,584 (Aug. 5, 2002). In response, the Commission specifically stated that "[t]his change is beyond the scope of this rulemaking dealing only with nonsubstantive changes . . . ." *Id*.

Approximately one week earlier, the Commission noted in a different rulemaking that "[t]he exemption for recounts is addressed in the Commission's current rules at 11 CFR 100.7(b)(20) . . . ." *Final Rule on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49064, 49,085 (July 29, 2002). The Commission specifically declined to alter that regulation when promulgating the "soft money" rules. This regulatory history demonstrates two key points:

- First, the Commission explicitly reaffirmed, post-BCRA, its view that recounts are not "elections" under the law, citing its original 1977 regulations.
- Second, in revising and reorganizing its regulations, the recount regulations were recodified without substantive change.

Finally, in its 2004 Legislative Recommendations to Congress, the Commission asked Congress to clarify whether recounts should be made subject to 2 U.S.C. § 441i(e)(1).[4] Congress did not act on this request.

Thus, recounts are not "elections" under the Act, so funds solicited, received and spent in connection with a recount are not funds solicited, received or spent in connection with an election, and are therefore not subject to 2 U.S.C. § 441i(e)(1). There is no evidence that Congress intended through BCRA to implicitly overturn the Commission's rules and advisory opinions on the treatment of recount funds, and in fact, there is substantial evidence of legislative acquiescence to the Commission's longstanding treatment of recount funds. Consequently, BCRA's restrictions at 2 U.S.C. § 441i(e)(1) on Federal candidates soliciting, receiving, directing, transferring, or spending funds in connection with either Federal or non-Federal elections do not alter the Commission's prior treatment of funds raised and spent by Federal candidates for recounts and recount funds.

[4] *See Legislative Recommendations 2004*, available at http://www.fec.gov/pages/legislative_recommendations_2004.htm#441ie (visited September 28, 2006) ("The Commission recommends that Congress amend 2 U.S.C. 441i(e)(1) to clarify the circumstances in which recall elections, referenda and initiatives, recounts, redistricting, legal defense funds, and related activities fall within the scope of activities that are "in connection with a Federal election" and are thus subject to the 441i(e)(1) restrictions.").

B. The Majority's Approach

The majority opinion ignores this overwhelming evidence of legislative acquiescence to the Commission's longstanding treatment of recount funds, and brings about a result that contradicts the language of the statute, Commission regulations, Commission Advisory Opinions, and legislative and regulatory history. This sleight of hand is accomplished by ignoring the statutorily defined term "election" and instead focusing on the phrase "in connection with an election for Federal office." In the majority's view, the phrase is distinguishable from, and broader than, the defined statutory term "election," and means something akin to "related to an election." This is a new addition to federal campaign finance law. The majority opinion would have us believe that the fact that Congress did not amend the definition of "election" is irrelevant because the term "election" itself is irrelevant. Rather, Congress supposedly overturned the Commission's longstanding regulations on recounts by adopting a new term of art, not identifying it as such, and not mentioning that this new term of art was intended to overturn 30 years of well-known, accepted practice. BCRA, of course, does not define the phrase "in connection with an election for Federal office." This means that the language "in connection with" is simply a means of referencing the statutory term "election," which in turn means that the phrase must be limited to circumstances that constitute an "election" under the Act.

In fact, this common-sense limitation is evident in past treatment of the phrase. In those instances in the past in which the phrase "in connection with an election" has been given meaning, it has always been limited to activities that seek to influence a voter's choice in the run-up to an actual election, and has never before been interpreted to reach post-election activity. For example, 2 U.S.C. § 441b prohibits corporations and labor organizations from making "a contribution or expenditure in connection with any [Federal] election." As the Supreme Court explained in *FEC* v. *Massachusetts Citizens For Life*, Section 441b was designed to ratify the language and understanding of Section 610 of the Taft-Hartley Act of 1947. The Court noted that Representative Hansen, the provision's sponsor, explained that "[t]he effect of this language is to carry out the basic intent of section 610, which is to prohibit the use of union or corporate funds for *active electioneering* directed at the general public on behalf of a candidate in a federal election." *FEC* v. *Massachusetts Citizens For Life*, 479 U.S. 238, 247-248 (1986) (citing 117 Cong.Rec. 43379 (1971)) (*emphasis added*).

Representative Hansen's use of the term "active electioneering" makes clear that, at least in the context of Section 441b, a contribution or expenditure made "in connection with" an election is limited to pre-election activity. There is, of course, no "active electioneering" involved in recount activities, since the election has already occurred, only a recounting or retallying of the votes cast in the election to ensure that every eligible vote has been accurately counted.[5]

[5] Similarly, in 1957, the Supreme Court determined that, under the Taft-Hartley Act of 1947, certain "broadcasts [that] urged and endorsed selection of certain persons to be candidates for representatives and senator to the Congress of the United States" constituted an "expenditure in connection with any (federal) election." *U.S.* v. *International Union United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)*, 352 U.S. 567, 584-585 (1957). Obviously, these advertisements were pre-election activity designed to influence voter choices.

In the context of "Federal election activity," Commission regulations define the phrase "in connection with an election in which a candidate for Federal office appears on the ballot" in terms of a time period. *See* 11 CFR 100.24(a)(1). That time period, however, ends on the date of the general election, and does not include any post-election activity. Of course, there would be no reason to conduct Federal *election* activity after the date of a general *election* – voter registration activity, get-out-the-vote activity, slate cards and sample ballots, voter identification, and public communications that PASO a Federal candidate -- because these activities are all conducted for the purpose of getting voters to the polls and influencing their choices. *See also Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49,064, 49,070 (July 29, 2002).

The majority opinion's approach also brings into question the continued validity of the Commission's most recent advisory opinion on legal defense funds. In the 2002 Democratic primary in Georgia's 4th Congressional District, Denise Majette defeated Cynthia McKinney. Ms. McKinney's supporters filed suit challenging Georgia's open primary system and sought to enjoin officials from conducting the general election. After Ms. Majette won the general election, the complaint was amended to seek a special primary and special general election for the seat won by Representative Majette. Representative Majette incurred legal fees extricating herself from this litigation over the election and incurred additional fees monitoring the litigation. She sought to establish a legal defense trust fund to raise money to pay these expenses, and stipulated that she would accept no more than $5,000 per year from any individual or organization (including corporations and labor unions), per House of Representatives rules. The specific question the Commission faced was whether amounts received and spent by the legal defense trust fund were funds "in connection with an election for Federal office" under 2 U.S.C. § 441i(e)(1)(A). The Commission determined that 2 U.S.C. 441i(e)(1)(A) did not alter the Commission's prior treatment of legal defense funds, as set forth in a series of Advisory Opinions from 1981-1996:[6]

> "There is no indication in the legislative history of BCRA that Congress intended section 441i(e)(1)(A) to change an area that is both well-familiar to members of Congress and subject of longstanding interpretation through statements of Congressional policy and Commission Advisory Opinions."[7] Advisory Opinion 2003-15 (Majette).

Furthermore, the Commission determined that since the lawsuit in which Representative Majette was involved was "not 'in connection with' a Federal election for purposes of section 441b, it should not be considered 'in connection with' a Federal election for purposes of 2 U.S.C. § 441i(e)(1)(A)." *Id*.

Under the majority's new view of "in connection with an election," must we now change the law on legal defense funds? It certainly seems that the litigation at issue in

[6] Advisory Opinion 2003-15 (Majette) was approved on August 14, 2003, by a 5-0 vote consisting of Commissioners Mason, Weintraub, Toner, Smith, and McDonald. Commissioner Thomas was not present.

[7] The majority does not explain why the exact same language is not applicable in this Opinion.

Advisory Opinion 2003-15 was "related to a Federal election." The majority's opinion puts the Commission in the strange position of saying, for example, that money raised prior to election day for a defense fund related to litigation over absentee ballot requirements are not limited under the Act; yet money raised after election day for litigation related to the validity of absentee ballots included in a recount are subject to the Act's restrictions at Section 441i(e)(1)(A).

C. Amending a Regulation by Advisory Opinion

In light of the foregoing, the recount regulations at 11 CFR 100.91 and 100.151 are valid and enforceable and unaffected by BCRA. Concluding otherwise, as the majority opinion does, constitutes rewriting Commission regulations, which, of course, may not be done via the advisory opinion process. *See* 2 U.S.C. § 437f(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title."); 11 CFR 112.4(e). *See also* Advisory Opinion 1999-11, Concurring Opinion of Commissioners Wold, Elliott, and Mason ("[A]dvisory opinions are clearly not rules or regulations. Advisory opinions may address only "the application of [the FECA] . . . or a rule or regulation prescribed by the Commission." . . . Subsection 437f(b) is an extraordinary restatement of a restriction which is clear from the plain reading of subsections 437f(a) and 438(d): the Commission may not establish a rule of general applicability through the advisory opinion process . . . ."). Only by opening a Proposed Rulemaking as required under the Administrative Practices Act could the Commission repeal or rewrite its two existing recount regulations. An Advisory Opinion repealing or amending an existing regulation is an *ultra vires* act.

II. COORDINATION BETWEEN STATE PARTIES AND FEDERAL CANDIDATES ON RECOUNTS

The majority's answer to Question 2(d) is that the limitations on coordination between federal candidates and state parties do not apply to recounts. This answer is the product of an amendment offered at the hearing on the Advisory Opinion for the sake of garnering a fourth vote to issue a response to the Requestors. As explained above, according to the majority opinion, the restrictions of 2 U.S.C. § 441i(e)(1)(A) apply to recount funds because recounts are "in connection with an *election* for Federal office." At the same time, however, also according to the majority opinion, a state party's coordinated spending for a candidate's recount is not limited because those amount restrictions apply only to activities that are "in connection with the *general election campaign* of a candidate for Federal office." *See* 2 U.S.C. § 441a(d)(3). In other words, the majority opinion is based on the odd claim that while recount activities are "in connection with an election," they are not "in connection with a general election campaign." The majority opinion utilizes a liberal interpretation of the former phrase, but a completely different interpretation of the latter phrase. The majority opinion also completely ignores the context of the phrase "general election campaign" for the sake of manufacturing a distinction.

2 U.S.C. § 441a(d)(3) uses the term "general election campaign" rather than "election" to describe that coordinated party expenditures are to be made with respect to the general election of the party's candidate. The word "campaign" simply recognizes the fact that party coordinated expenditures are intended to contribute to the candidate's campaign for office. The Commission has long interpreted this phraseology in terms of recordkeeping and accounting. Under Commission regulations, no coordinated party expenditures are attributed, regardless of when they are made, to a candidate's primary election. *See* 11 CFR § 109.34 ("A political party committee authorized to make coordinated party expenditures may make such expenditures in connection with the general election campaign before or after its candidate has been nominated. All pre-nomination coordinated party expenditures shall be subject to the coordinated party expenditure limitations of this subpart, whether or not the candidate on whose behalf they are made receives the party's nomination.").[8] Regardless of when a party's coordinated expenditure is made, even if it is made in the year *preceding* the election year, it is treated as if it were made with respect to the general election. This concept cannot be captured by using the term "election" because that term is defined to include both primary and general elections. *See* 2 U.S.C. § 431(1). A very simple explanation exists for why the language of Section 441a(d)(3) differs from Section 441i(e)(1), and it is absolutely not the case that any meaningful distinction can be drawn between the terms "election" and "general election campaign" for purposes of considering the applicability of 2 U.S.C. § 441i(e)(1) to recounts.

In any event, if the majority opinion's interpretation of "in connection with an election" is correct, then its interpretation of "in connection with a general election campaign" must be wrong. The majority opinion seeks to have it both ways. They consider a recount to be "in connection with an election" when it brings about a desired result under 2 U.S.C. § 441i(e)(1)(A), but not to be "in connection with a general election campaign" when that conclusion is necessary to produce a different result. The unprincipled nature of this argument is obvious. The claim is inherently contradictory, and has no basis in the law or the Commission's regulations.

It is also worth noting that although not addressed in the majority opinion, under the majority's rationale and view of recount funds with regard to state parties, national committees of political parties must now also be freed from the coordinated party expenditure limits with respect to recounts.

III. PUBLIC POLICY

This Advisory Opinion request required nothing more than an application of the definition of "election" contained in the Act and the Commission's existing recount regulations. While public policy considerations cannot take precedence over clear statutory and regulatory language, it is useful to consider, from a public policy perspective, why the continued application of the existing recount regulations is in the best interests of the federal election process and the continued viability of our democratic process. These

[8] 11 CFR 109.34: Section 109.34 is the successor to 11 CFR 110.7 (2002).

considerations offer rationales for why Congress may not have wanted to overturn the Commission's recount regulations.

A. Accurate Vote Tallies

The Commission's recount regulations advance an important public policy goal, one recognized by Congress when it passed the Help America Vote Act of 2002 ("HAVA"), Pub. Law 107-252, codified at 42 U.S.C. §15301 *et seq*. HAVA was passed by Congress in the wake of the Florida recount in the 2000 presidential election. Many different task forces were set up to examine the problems that arose in that election and to propose solutions, including by organizations such as the National Association of State Election Directors. HAVA was intended to provide a legislative solution for those problems and to improve the administration of federal elections. Title III of HAVA provides a set of "Uniform and Non-Discriminatory Election Technology and Administration Requirements." From the requirement in Section 301(a)(6) that States define exactly "what constitutes a vote and what will be counted as a vote," to Section 302(a) that requires states to provide provisional ballots to voters whose names do not appear on registration lists, HAVA was intended to ensure that every eligible voter is able to vote and that his vote is accurately counted, particularly in any recount.[9] The purpose in enacting HAVA was to avoid having the kinds of questions and problems that arose in the 2000 recount occur again.

The Commission's recount regulations serve the same important public policy goal of assuring the accurate tallying of votes – these funds are used to guarantee that every ballot cast by an eligible voter is counted, and that no person's vote is lost. Making it more difficult for recounts to occur by limiting funding when there is a question over the counting of ballots that have already been cast in an election that is over damages public confidence in the legitimacy of the outcome of elections. It will lead to uncertainty over the actions of elected officials when no finality is provided to the casting and tallying of the votes that propelled those officials into office. This can lead to the appearance of corruption in the election process when legitimate questions over the validity of election results cannot be resolved because the funds required to engage in a recount are not available, particularly to a challenger.

B. Realities of State Recount Laws

The result of the majority's opinion is that federal candidates may raise funds for a recount in increments up to $2,100 per individual donor. A state party committee may raise up to $10,000 per individual donor for efforts to assist in a candidate's recount. With these ground rules, the prudent candidate in what is expected to be a close election would build a recount fund during the course of the campaign. However, for many candidates, especially challengers who lack the fundraising abilities of established incumbents, this will not be a feasible course because it will not make sense to set limited funds aside for a possible recount. How, then, do these realities interact with state recount laws?

[9] 42 U.S.C. §15481(a)(6), 15482(a).

State laws regarding the conduct of recounts vary widely,[10] and many states require the candidate seeking the recount to make a deposit to cover the costs of the recount. One of those states, Washington, has been the site of two recent statewide recounts. In 2000, the Senate election between Slade Gordon and Maria Cantwell was subject to a statewide recount, although it did not change the initial result of the election.[11] In 2004, a statewide recount was conducted for the gubernatorial election. The initial vote count put the Republican candidate, Dino Rossi, ahead by 261 votes.[12] This small margin triggered a mandatory recount, funded by the state.[13] After the mandatory, machine recount, the first result was unchanged, and Rossi led by 42 votes. The Washington State Democratic Party, on behalf of the Democratic candidate, Christine Gregoire, then filed an application for a second recount, this time manual. Under Washington law, "an application for a recount *must be filed within three business days* after the county canvassing board or secretary of state has declared the official results of the primary or [general] election for the office or issue for which the recount is requested." Wash. Rev. Code § 29A.64.011 (*emphasis added*). A deposit must also be made at the time the application is filed: "[t]he person filing an application for a manual recount shall, at the same time, deposit with the county canvassing board or secretary of state, in cash or by certified check, a sum equal to twenty-five cents for each ballot cast in the jurisdiction or portion of the jurisdiction for which the recount is requested as security for the payment of any costs of conducting the recount. If the application is for a machine recount, the deposit must be equal to fifteen cents for each ballot." *Id*. at § 29A.64.030.[14]

The Democrats raised close to $1 million to pay for the manual recount,[15] and posted a deposit of approximately $730,000 with the Secretary of State to cover the costs.[16]

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[10] The National Conference of State Legislatures provides an overview of state recount procedures at http://www.ncsl.org/Programs/legman/elect/recounts.htm.

[11] *See* http://archives.cnn.com/2000/ALLPOLITICS/stories/12/01/washingtonsenate.ap/ ("Cantwell wins last unsettled Senate race").

[12] *See* http://seattletimes.nwsource.com/html/localnews/2002093547_webguv17m.html ("Rossi apparent winner in governor's race; recount next").

[13] *See* Wash. Rev. Code § 29A.64.021.

[14] "The cost of the recount shall be deducted from the amount deposited by the applicant for the recount at the time of filing the request for the recount, and the balance shall be returned to the applicant. If the costs of the recount exceed the deposit, the applicant shall pay the difference. No charges may be deducted by the canvassing board from the deposit for a recount if the recount changes the result of the nomination or election for which the recount was ordered." Wash. Rev. Code § 29A.64.081.

[15] *See* http://www.boston.com/news/politics/governors/articles/2004/12/31/vote_for_governor_in_washington_certified?pg=full ("But state Democrats raised nearly $1 million to pay for a full hand recount, as the law allows.").

[16] *See* http://www.cnn.com/2004/ALLPOLITICS/12/22/washington.governor/index.html ("the state Democratic Party put up a $730,000 deposit to pay for a statewide hand recount").

Of this sum, however, John Kerry donated $250,000 from unused campaign funds.[17] The fundraising effort was also assisted by a solicitation from Howard Dean.[18] The second recount, which was not without controversy, changed the results of the first two ballot tallies, and the Democratic candidate was certified the winner by a 129-vote margin.[19]

This real world example allows us to examine the implications of the majority opinion. It is certainly possible for a candidate to raise an additional $730,000 in a very short period *after* an election, although the Washington example suggests that at least one very large donation was essential to the effort. However, raising such a large amount of money in a short period of time is no easy task. Presumably, a Federal candidate, who could not rely on the largess of a single source, would have to return to his individual donor list, and ask past contributors for additional funds. In the best case scenario, this candidate could raise the amount needed from 348 individuals who each contribute an additional $2,100 to his recount fund. In the worst case scenario, the candidate would be unable to raise the funds needed and unable to request a recount.[20] Citizens would never know whether their elected representative was actually elected. Of course, the candidate could seek assistance from the state party, which may accept additional contributions from individuals in amounts up to $10,000.[21] However, not every candidate has the backing of his party structure, and assistance from the party committees is not available to an independent candidate.

The majority's opinion, when viewed in light of the Washington experience, raises the very real possibility that a candidate (and/or the state party) might not be able to raise the funds necessary to finance a recount, which, in turn, could have the effect of leaving in place an inaccurate tallying of votes. An overwhelming amount of evidence that Congress did not intend the result manufactured by the majority comes from the language and history of the Act and Commission regulations. That evidence is more than sufficient to decide

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[17] *See* http://seattlepi.nwsource.com/local/201970_governor02.html ("Former presidential candidate John Kerry contributed at least $200,000 of unused campaign contributions yesterday to help fellow Democrat Christine Gregoire keep the governor's race alive and pay for a statewide hand recount. 'John Kerry really came to our rescue,' said state Democratic Party Chairman Paul Berendt. 'But our ability to pay for a statewide recount is still subject to money which is not in. ... We are working to move heaven and earth to get all of the money we need.'"). The actual amount appears to be $250,000, as Senator Kerry stated on *Meet The Press* on January 30, 2005. *See* http://www.washingtonpost.com/ac2/wp-dyn/A50306-2005Jan31 ("KERRY: I gave $250,000 to Christine Gregoire's recount in Washington.").

[18] *See* http://www.king5.com/topstories/stories/NW_120304ELBgregoire_recountLJ.5cd203b.html ("Much of that money came in after an appeal was made by Vermont Gov. and former presidential contender Howard Dean.").

[19] *See* http://www.boston.com/news/politics/governors/articles/2004/12/31/vote_for_governor_in_ washington_certified?pg=full ("Vote for governor in Washington certified").

[20] In the 2004 Washington recount, Christine Gregoire said she would concede the election to Dino Rossi if her party could not afford a full, statewide recount. *See* http://www.king5.com/topstories/stories/NW_120304ELBgregoire_recountLJ.5cd203b.html ("'If they can't raise enough money to do a statewide recount manual recount [sic], then I'm not interested in a recount at all,' said Gregoire.")

[21] A national party committee could raise up to $26,700 per individual.

this matter. However, these policy considerations also serve to highlight just how unlikely it was that Congress intended to apply the limitations of BCRA to recount efforts.

IV. CONCLUSION

The majority affects a significant change in federal campaign finance law with its opinion. For 30 years, recount activities were governed by Commission regulations, and candidates for office relied on the Commission's consistent approach. However, only a month before a Federal election, the rules have been changed, not by a Congressional amendment to the Act, or by a properly-noticed rulemaking, but by an Advisory Opinion. As explained, this change brings about a misapplication of the law.

The real world impact of this decision remains to be seen, although recent experience with recounts and the loss of public confidence in the election process suggests that the results will not be beneficial. There is now an increased probability that questions about the validity of election results could go unresolved due to the unfortunate – and unwarranted – confluence of state recount laws and federal fundraising restrictions. I sincerely hope that the Commission's decision in this matter does not cause denial of access to a state's recount machinery simply because a candidate is unable to raise sufficient funds to pay for a recount. I cannot believe that Congress intended such a result or that it would be good for our democratic process.

October 20, 2006

_____s/_____
Hans A. von Spakovsky
Commissioner